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principal case seems to be much preferable, as well as sustained by the weight of authority. 8 Cyc. 755.

While, as was said above, and as Judge Keith held in the principal case, provisions in a constitution of a prohibitive or negative character are generally construed to be self-executing, this is not always so. In *Grove v. Slaughter*, 15 Peters 449, the Supreme Court of the United States held that the following provision of the constitution of Mississippi was not self-operative: "The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." And this opinion was reaffirmed in *Rowan et al. v. Runnels*, 5 How. 134. The case of *Grove v. Slaughter*, *supra*, had the distinction of being argued by Daniel Webster and Henry Clay, who took the position followed by the court. While it may be said that the provision referred to was positive in that it put an end to existing practices, the force and effect of the provision was to declare those practices unlawful; and the very idea of *put an end to* is negative. C. B. G.

CITY OF NEWPORT NEWS V. WOODWARD.

Supreme Court of Appeals of Virginia.

June 15, 1905.

[51 S. E. 193.]

MUNICIPAL CORPORATIONS—*Police force—Removal—Power of Mayor—Constitution—Self-executing provisions.*—Const. art. 8, sec. 117 [Va. Code 1904, p. ccxxviii], provides that the charters of all cities and towns are amended to conform to the Constitution, and section 120 [Va. Code 1904, p. ccxxxix] provides that the mayor shall have power to suspend officers and members of the police and fire departments. At the time of the adoption of the Constitution, the police board of the city of Newport News, under its charter (Acts 1895-96, p. 86, c. 64, sec. 62) had the power of suspending police officers. The former Constitution (article 6, sec. 20) provided that the mayor should have power to suspend or remove city officers—which was held not to include policemen—such section appearing with other provisions relative to cities and towns, and containing the provision that the General Assembly should pass such laws as might be necessary to give effect to the provisions. *Held*, that section 120 of the new Constitution was not self-executing, and did not alone give the mayor of Newport News authority to suspend a police officer.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, sections 32-34.]

Error to Corporation Court of Newport News.

Action by J. W. Woodward against the city of Newport News. Judgment in favor of plaintiff, and defendant brings error.

Reversed.

J. A. Massie, City Attorney, for plaintiff in error.

Ashby & Read, for defendant in error.

CARDWELL, J.:

On August 26, 1902, J. W. Woodward, defendant in error, a police officer of the city of Newport News, was, upon charges preferred, and after a hearing had, suspended from office for a period of 30 days; at the end of which term of suspension he was again assigned to duty, and served for a few days, when he was again suspended upon other charges preferred, after a hearing, for another period of 30 days, which was afterwards reduced to 15 days. On the 14th day of November, 1903, Woodward instituted this suit in the corporation court of the city of Newport News against the city to recover \$90, the amount of salary that he claimed was due him during the term of his suspension; and on April 18, 1904, a jury having been waived, and all questions of law and fact submitted to the court, judgment was rendered against the city for the sum of \$60. It was the opinion of the court below that the police board of the city of Newport News did not have power to suspend policemen at the time that the defendant in error was suspended, by reason of sections 117 and 120 of the present Constitution, which took effect July 10, 1902, which was prior to the date of this suspension.

These sections of the new Constitution, as far as they are pertinent to the issue in this case, are as follows:

Art. 8, sec. 117 [Va. Code 1904, p. cccxxviii]: "Cities and towns of the state having at the time of the adoption of this Constitution a municipal charter, may retain the same, except in so far as it shall be repealed or amended by the General Assembly; provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution."

Art. 8, sec. 120 [Va. Code 1904, p. cccxxix]: "The mayor shall see that the duties of the various city officers, members of the police and fire departments, whether elected or appointed in or for such city, are faithfully performed. He shall have power to investigate

their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by persons so examined shall not be used against them in any criminal proceeding. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers, and also such members of said departments when authorized by the General Assembly, for misconduct in office or neglect in duty, to be specified in the order of suspension or removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person, or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed shall have an appeal of right to the corporation court," etc.

Unless superseded by the provisions of the new Constitution above cited, the police board of the city of Newport News, by virtue of the charter of the city, section 62 (Acts 1895-96, p. 86, c. 64), had at the time of the suspension of defendant in error absolute control and authority over the police force of the city. See, also, *Johnson v. Barham, J.*, 99 Va. 305, 38 S. E. 136.

The sole question to be considered, therefore, is whether or not section 120 is self-executing, or required legislative action to render it operative. If self-executing, section 117 operated to repeal so much of the charter of the city of Newport News as is repugnant thereto.

The legislature of Virginia enacted the following provision in relation to cities and towns (Acts 1902-04, p. 422, c. 296):

"Sec. 1033. Mayors of cities; how chosen; their duties; appeals from their decisions; how removed for malfeasance, etc.—In every city there shall be elected by the qualified voters thereof a mayor.

. . . The mayor shall see that the duties of the various officers, members of the police and fire departments, whether elected or appointed in and for such city, are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by the person so examined shall not be used against him in any criminal proceeding. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers for

misconduct in office or neglect of duty, to be specified in the order of removal; but no such removal shall be made without reasonable notice to the officer complained of, and an opportunity afforded him to be heard in person, or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed, or the member of the police and fire department so suspended, unless the charter of the city provides for an appeal to the board of police commissioners, or to the board of fire commissioners, shall have an appeal of right to the corporation court," etc.

It was unquestionably the purpose of the convention in enacting section 120 of the Constitution to take from the police board of the several cities of the commonwealth, or wherever the power and control was theretofore conferred, the control and supervision over the police force of the several cities and confer it upon the mayor; but was it intended to confer this power and control upon the mayor without reserving to the legislature supervisory authority over the exercise of the power? It was, as is conceded, plainly not so intended as to the power of removal.

It is well recognized in treatises on constitutional limitations and the decided cases that, if the nature and extent of the right conferred by a constitutional provision is fixed by the provision itself, so that the same can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing. The question is one of intention in every case, and, if it is apparent that no subsequent legislation is necessary to carry such provision into effect, then such provision is self-executing.

Says Cooley in his work on Constitutional Limitations, p. 121: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

In *Illinois Cent. R. R. Co. v. Ihlenberg*, 75 Fed. 873, 21 C. C. A. 546, 34 L. R. A. 393, it was held that whether or not a constitutional provision is self-executing is a question always of inten-

tion, to be determined by the language used and the surrounding circumstances.

The former Constitution (article 6, sec. 20) provided that "he [the mayor] shall have power to suspend or remove such officers," etc.; and in *Burch v. Hardwicke*, 30 Gratt. 24, 32 Am. Rep. 640, it was held that policemen were state officers; that as such they were not contemplated in the words "such officers," but that this meant city officers; and as to the latter the mayor, by the Constitution, had the exclusive power of removal. It was further held that the provisions of the charter of the city of Lynchburg, taking from the mayor the power to remove the chief of police, and vesting it in the police board, was null and void. Article 6, sec. 20, of the former Constitution, appeared along with the other provisions provided for the government of cities and towns, and contained the provision that "the General Assembly, at its first session after the adoption of this Constitution, shall pass such laws as may be necessary to give effect to the provisions of this article."

It may be true, as counsel for defendant in error say, that the provisions of the new Constitution enlarging the powers of the mayors of the several cities and towns with reference to suspension and removal of members of the police force and fire department were intended to overcome the decision in *Burch v. Hardwicke*, *supra*, but the question remains whether or not section 120 *supra*, was intended to operate *proprio vigore* as to the power of the suspension of the members of the police force and fire department and refer only the subject of the removal of such officers by the mayor to the legislature for action.

Discussing the light which the purpose to be accomplished may afford in the construction of a constitutional provision in Cooley's Con. Lim. (6th Ed.) p. 80, the learned author says: "The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision, and it is especially important to look into it if the Constitution is the successor to another, and in the particular essential changes have apparently been made."

Here we have a constitutional provision which succeeds another, dealing with the same subject, and the former plainly referred the whole subject to the legislature for action, while the latter is ambiguous in that respect. Under these circumstances we do not think it is a reasonable construction of the language employed that it

was intended by the framers of the provision to refer to the legislature for action the power intended to be conferred upon the mayor of a city or town to remove a member of the police force or fire department, while the suspension of these officers is left entirely in his power without legislative authority or control over his action.

We have no decision by this court helpful in determining the question under consideration. *Arey v. Lindsay*, 103 Va. —, 48 S. E. 889; *Oppenheim v. Myers*, 99 Va. 582, 39 S. E. 218, and *Burch v. Hardwicke*, 30 Gratt. 24, 32 Am. Rep. 640, have no application whatever to this case. Our conclusion is that, reading section 120 of the present Constitution in the light of the surrounding circumstances, the language used clearly indicates that it was the purpose of its framers to refer the subject—the power and control over the police force in the several cities of the state—to the legislature for action, and that said action is not to be construed as self-executing.

The judgment of the corporation court of Newport News must therefore be reversed and annulled, and this court will enter such judgment as that court should have entered.

NOTE.—The decision in the case above seems to be in conflict with *Trigg v. State*, 49 Tex. 645, cited in 8 Cyc. 756, where it was held that no legislation was needed to authorize a district judge to remove a county attorney or other county official from office for official misconduct, under a constitutional provision authorizing such removals for offenses prescribed, and others defined by law.

For extended note, see note appended to *Robertson v. City of Staunton*, published *ante* in this issue of the REGISTER.

WILLIAMSON V. SOUTHERN RY. CO.

Supreme Court of Appeals of Virginia.

June 15, 1905.

[51 S. E. 195.]

1. RAILROADS—*Action for injuries—Evidence.*—In an action against a railroad for injuries, evidence examined, and *held* insufficient to show that plaintiff at the time of his injury was using the defendant's tracks as a walkway as an invited guest of the defendant or otherwise than as a bare licensee.